



Public Knowledge

October 25, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 07-52, Commission Inquiry Into Broadband Market Practices; MB Docket No. 09-182, 2010 Media Ownership Review; GN Docket No. 09-191, Preserving the Open Internet Broadband Industry Practices; GN Docket No. 10-25, Examination of the Future of Media and Information Needs of Communities in a Digital Age; MB Docket No. 10-56, Application of Comcast Corporation General Electric Company and NBC Universal Inc. for consent to assign license or transfer control of licensees; MB Docket No. 10-71, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent.

Dear Ms. Dortch:

Today, Harold Feld and John Bergmayer of Public Knowledge met with Krista Witanowski, media advisor to Commissioner Baker, and Joshua Cinelli, media adviser to Commissioner Copps. The meetings touched on the following topics.

Comcast/NBC Merger.

Public Knowledge reiterated the positions in its Petition to Deny, and explained how recent Internet blocking events (Fox blocking Cablevision ISP customers from Fox content online, and ABC, NBC, and CBS blocking Google TV's web browser) should affect the merger analysis. Specifically, since NBC has the same control over Hulu as Fox, it could engage in the same kind of blocking as Fox did. A merged company would have the incentive not only to engage in such blocking during retransmission negotiations, but also to block customers of competitive ISPs and MVPDs.¹

NBC has a history of trying to leverage its online offerings into extra revenue—it only made its recent online Olympics coverage available to some ISPs, whose affiliated MVPDs cut special deals with NBC. (In doing this, NBC demonstrated that it values its over-the-air viewers less than its cable viewers. This is inappropriate for a company that uses billions of dollars of spectrum that could be put to other uses for free.) And Comcast, by blocking BitTorrent, showed that it was not above using deceptive means to disrupt a new distribution channel. The recent examples of Internet blocking by companies similarly situated to NBC provide ample reason for the Commission to deny the merger.

Retransmission consent.

¹ As PK has stated before, these blocking incidents are not net neutrality violations since they are not done by an ISP. But they are problems for consumers nonetheless.

The Cablevision/Fox dispute continues. Meanwhile, millions of viewers in the New York area are without Fox programming, including postseason baseball. The Commission should act on the Petition for Rulemaking filed by Public Knowledge and others that asks the Commission to reform its retransmission consent rules. Those rules were written in a different time, before anyone imagined that access to content on the Internet would become part of a retransmission dispute, and before broadcasters and their networks had the negotiating advantage they do today. The consequence of this has been increasing cable bills for consumers as higher and higher retransmission fees are extracted. The Commission has broad statutory authority to “establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent,” and must “consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier....” 47 USC § 325(b)(3)(A). By all means, the Commission should continue tweeting accounts of baseball games. But it should also use its statutory authority to protect consumers.

The Anticompetitive Nature of Major Networks Blocking Google TV and the Future of Video Competition.

It is now obvious that broadcasters see online video as a threat. They have blocked Boxee and Kyo (web browsers that work on computers attached to TVs) for some time now. By working together to block a new competitor (Google TV), ABC, CBS, and NBC have violated their public trust as broadcasters, and may have violated antitrust law. While generally speaking, content owners have the right to make their content available on their own terms, they do not have the right to behave anticompetitively when doing so. It is important to be clear exactly what the networks have done here: they have blocked a web browser that works like any other. Under the networks’ new vision for the Internet, Microsoft apparently must negotiate with broadcasters if it wants Internet Explorer users to be able to access their websites. Broadcasters should not leverage their power and harm the public interest by trying to dampen emerging competition.

Public policy has long favored the emergence of new channels of video distribution. First cable and then satellite were given statutory copyright licenses and other special legal advantages to allow them to exist. Congress further assured the continuing viability of competitive MVPDs by enacting program access rules that prevented any one programming distributor from having must-see exclusives. The result of this has been more good than bad, but years of *ad hoc* solutions by both Congress and the FCC have created a complex system that unfairly discriminates between technological platforms. Going forward, the Commission should evaluate how to continue to promote competition in video programming distribution, particularly online. For example, the Commission should consider extending program access rights to online video providers, and recognizing that an purely over-the-top provider could qualify as an MVPD. A bold rethinking of what it takes to promote new forms of competition could prevent the next round of high-profile blocking incidents.

Sincerely,

/s John Bergmayer
Staff Attorney
Public Knowledge